

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

MARC FREEDMAN
VICE PRESIDENT, WORKPLACE POLICY
EMPLOYMENT POLICY DIVISION

1615 H STREET, N.W.
WASHINGTON, D.C. 20062
202/463-5522

August 23, 2021

Ms. Jessica Looman
Principal Deputy Administrator
Wage and Hour Division
U.S. Department of Labor
Washington, DC 20210

By electronic submission: <http://www.regulations.gov>

RE: RIN 1235-AA21-- Tip Regulations Under the Fair Labor Standards Act (FLSA); Notice of Proposed Rulemaking, 86 Fed. Reg. 32818 (June 23, 2021)

Dear Principal Deputy Administrator Looman:

The U.S. Chamber of Commerce (the Chamber) presents these comments to the Department of Labor (“the Department” or “DOL”) in response to its Notice of Proposed Rulemaking with respect to the Tip Regulations Under the Fair Labor Standards Act (the “FLSA” or the “Act”), (“Proposed Rule”).¹ The Proposed Rule should be withdrawn because it is a highly-detrimental, arbitrary, about-face change to the common sense “dual jobs” portion of the Final Rule that the DOL published in the Federal Register on December 30, 2020 (“2020 Tip Final Rule”).²

As is discussed below, the Proposed Rule would upend the existing framework for compensating tipped workers by creating needless costs, barriers, and burdens that would negatively impact employers, employees, and consumers. Moreover, the Proposed Rule improperly attempts an end run around Congress by making the FLSA tip credit provision so unwieldy as to render it a nullity. Congress has the power to amend or eliminate this provision of federal law. The DOL does not.

The hospitality, restaurant, and other service-oriented industries that rely most heavily on tipped employees are struggling to recover from the devastating effects of the COVID-19 pandemic and the new challenges posed by the Delta variant. The Proposed Rule would only create more roadblocks to economic recovery for such industries and employers during these challenging and uncertain times.

For these reasons, the Chamber opposes the Proposed Rule, respectfully requests that it be withdrawn, and encourages the DOL to fully implement the dual tasks portion of the 2020 Tip Final Rule.

¹ 86 Fed. Reg. 32818 (Jun. 23, 2021).

² 85 Fed. Reg. 86756 (Dec. 30, 2020).

I. Congress Created the FLSA’s Statutory Tip Credit to Benefit Both Employees and Employers.

Employees in a variety of industries can generate significant income through the receipt of tips from customers. Accordingly, Congress allows employers to pay tipped employees a lower base minimum wage and take a “tip credit” under Section 3(m) of the FLSA in recognition of this combined income stream.³ Pursuant to Section 3(t) of the FLSA, a “tipped employee” is “any employee engaged in an occupation in which he customarily and regularly receives more than \$30 a month in tips.”⁴

The tip credit benefits both employees and employers. On average, tip-eligible restaurant employees who are paid a lower base wage due to the tip credit actually earn between \$19 and \$25 per hour, according to National Restaurant Association research.⁵ This is obviously quite a bit more than the current federal minimum wage of \$7.25 per hour.

Employers benefit from the tip credit, as well. Restaurant employers who make use of the tip credit can take a FICA Tax Tip Credit, which is a partial tax credit that equals the employer’s FICA tax portion on tipped income that exceeds the federal minimum wage. In business sectors with narrow margins, such as the restaurant industry, an employer’s ability to make use of this type of credit is especially valuable.

Under Section 3(m)(2)(a)(ii), employees for whom a tip credit is taken may pool their tips with other employees who customarily and regularly receive tips, thus creating a larger pot of money for these employees. However, if a tip credit is not taken, then the employer is allowed to expand the tip pool to back of house employees who would not otherwise get to share in the tips, such as cooks and dishwashers, but not to managers or supervisors.⁶

Tipped employees receive no lesser minimum wage protections than other employees under the FLSA. If, in fact, their base minimum wage plus their tips does not equal at least the full federal minimum wage of \$7.25 per hour, then the employer must make up the difference to meet that threshold.⁷

II. The 2020 Final Rule Supports the FLSA’s Text and Intent.

When read in combination, the language of Sections 3(m) and 3(t) should allow an employer to take a tip credit with respect to any employee engaged in an occupation in which the employee customarily and regularly receives more than \$30 per month in tips. This is true regardless of the amount of time spent by the employee on duties that directly generate tips, and as long as the tip credit being taken does not exceed the amount of tips. In line with this approach, someone who is legitimately employed as a waitperson, or bartender for example, and who regularly and customarily receives \$30 or more per month in tips, should always be viewed

³ See 29 U.S.C. §203(m).

⁴ See 29 U.S.C. §203(t).

⁵ “Tips on Tipping.” NATIONAL RESTAURANT ASSOCIATION. (May 13, 2021), available at, <https://www.restaurant.org/articles/news/tips-on-tipping>

⁶ See 29 U.S.C. §203(m)(2)(B).

⁷ See 29 U.S.C. §203(m)(2)(A)(ii).

as being engaged in a tipped occupation, regardless of how much time that person spends on tasks that are viewed as directly producing tips, related to producing tips, or are unrelated to producing tips but still are commonly performed by employees in that occupation.

The DOL first promulgated tip regulations in 1967, and has always included a “dual jobs” regulation recognizing that an employee who is employed in a tipped occupation may perform a variety of duties that do not directly generate tips, but that still are a customary part of the job and may impact the quality of the customers’ experience. As the DOL itself notes in the Proposed Rule, the legislative history accompanying the 1974 amendments to the FLSA’s tip provisions provided examples of several tipped occupations, and DOL guidance documents have also identified additional examples.⁸

In a 1988 revision to its Field Operations Handbook, the DOL instructed investigators that “where the facts indicate that specific employees are assigned to maintenance, or that a tipped employee spends a substantial amount of time (in excess of 20 percent) performing preparation work or maintenance, no tip credit may be taken.” This sub-regulatory guidance to investigators morphed into what has been known as the “80/20 rule,” under which DOL field staff took the position that a tip credit could not be taken in a workweek if the employee’s time spent on non tip-related duties exceeded 20 percent of the employee’s workweek.

The 80/20 rule proved to be confusing and unworkable, and the DOL dispensed with it in a January 2009 opinion letter. That opinion letter was withdrawn following a change in administrations and then was reinstated in 2018. In the opinion letter, the DOL took a practical approach, stating that an employer could apply the tip credit to time spent by employees when they performed non-tipped duties “related to” a tip producing occupation “as long as they are performed contemporaneously with the duties involving direct service to customers or for a reasonable time immediately before or after performing such direct-service duties.”⁹

Consistent with the reinstated opinion letter, the DOL then dispensed with the 80/20 rule in a February 2019 Field Assistance Bulletin and in a revision to the Field Operations Handbook,¹⁰ and then in the 2020 Tip Final Rule, published on December 30, 2020. The 2020 Tip Final Rule clarified what it means for an employee to be engaged in a tipped occupation under Section 3(t) of the FLSA¹¹ and was scheduled to become effective on March 1, 2021. It rejected the 80/20 rule and created greater predictability for employers and employees. Helpfully, the 2020 Tip Final Rule also identified the DOL-sponsored Occupational Information Network [O*NET]¹² as a resource to determine whether non-tipped duties are related to a tipped occupation.

⁸ See 85 Fed. Reg. at 32820 (citing and quoting S. Rep. No. 93-690, at 43 (Feb. 22, 1974), and also citing DOL Field Operations Handbook 30d04(b)); *see also* DOL Opinion Letter FLSA 2009-12 (Jan. 15, 2009) (finding barbacks to qualify as tipped employees); DOL Opinion Letter FLSA2008-18 (Dec. 19, 2008) (finding itamae-sushi and teppanyaki chefs to qualify as tipped employees).

⁹ DOL Opinion Letter FLSA2018-27 (Nov. 8, 2018) (reproducing and reissuing DOL Opinion Letter FLSA2009-23 (Jan. 16, 2009) as an official statement of WHD policy and as an official ruling for purposes of the Portal-to-Portal Act, 29 U.S.C. §259).

¹⁰ Field Assistance Bulletin 2019-2 (Feb. 19, 2019) (describing and explaining revisions to FOH 30d00(f), which make the FOH provision consistent with Opinion Letter FLSA2018-27).

¹¹ 85 Fed. Reg. 86756.

¹² <https://www.onetonline.org/>

The 2020 Tip Final Rule was much truer to both the statutory text and intent than the 80/20 rule. It provided examples of tasks related to a tipped occupation that were rooted in reality, and it offered greater clarity to employers and employees. The 2020 Tip Final Rule was practical and efficient and should have been allowed to take effect.

III. DOL Has Not Sufficiently Explained Why The 2020 Tip Final Rule Was Not Put Into Effect.

Unfortunately, several portions of the 2020 Tip Final Rule never went into effect. Immediately upon the change in presidential administrations, in February 2021, the DOL delayed the effective date of the dual jobs portion of the 2020 Tip Final Rule from March 1, 2021, until April 30, 2021. The DOL then delayed the effective date until December 31, 2021, and subsequently published the Proposed Rule. If adopted, the Proposed Rule would withdraw and completely upend the dual jobs provision contained in the 2020 Tip Final Rule.

The DOL's withdrawal of the dual jobs provision in the 2020 Tip Final Rule is procedurally flawed. The DOL has arbitrarily halted the effective date of a regulation simply because the administration has different policy preferences. The appropriate course would have been to let the rule go into effect and then gather data on its impact and effectiveness. At that point, if DOL wanted to revise the policy, stakeholders could at least provide empirical evidence as to the results of the 2020 Tip Final Rule. DOL's position would be bolstered if data from the rule being implemented showed difficulty in complying with it, or employees not being compensated properly. Instead, DOL is proceeding with a rulemaking to replace it without any evidence of a problem.

IV. The Proposed Rule Would Be Costly and Administratively Unworkable for Industries that Rely on the Tip Credit.

Substantively, the Proposed Rule would reduce the clarity and predictability contained in the 2020 Tip Final Rule. Moreover, if adopted, the Proposed Rule would create onerous administrative requirements and obstacles that would improperly interfere with many employers' legitimate and statutory right to make use of the FLSA tip credit.

A. The Proposed Rule Is Substantively Flawed and Therefore Unworkable For Employers To Implement.

The Proposed Rule would revise 29 CFR §531.56(e) and would add a new subparagraph (f). The Proposed Rule is problematic because it: (1) contains vague, circular, and overly restrictive definitions of "tip-producing work" and work that "directly supports tip-producing work" for which the employer could take a tip credit; and (2) contains a vague, circular, and overbroad definition of work that "is not part of the tipped occupation" and for which the employer could not take a tip credit. The use of the phrase "directly supports" is particularly concerning, as it replaces the concept of duties "related to" a tip producing occupation. Certainly, there are duties that are and have long been "part of" a tipped occupation because they are "related to" that occupation, even if they do not constitute work that "directly supports tip-producing work." The Proposed Rule thus creates a gap that is likely to lead to litigation (see discussion *infra*).

The Proposed Rule compounds these problems by stating that an employer can take a tip credit for work that supports tip-producing work “provided that the employee does not perform that work for a substantial amount of time.” The definition of a “substantial amount of time” within the Proposed Rule is extremely limiting and overly narrow. In proposed language that would be included at 29 CFR §531.56(f)(iii), it states that an employee has performed work for a substantial amount of time if:

(A) For any workweek, the directly supporting work exceeds 20 percent of the hours worked during the employee’s workweek. If a tipped employee spends more than 20 percent of the workweek on directly supporting work, the employer cannot take a tip credit for any time that exceeds 20 percent of the workweek; or

(B) For any continuous period of time, the directly supporting work exceeds 30 minutes. If a tipped employee performs directly supporting work for a continuous period of time.¹³

Thus, to take a tip credit under the Proposed Rule, employers would need to implement timekeeping and job coding systems that allow employees to honestly, accurately, and precisely record the amount of continuous and non-continuous time spent performing tip producing work, work that directly supports tip-producing work, and work that is not part of the tipped occupation. Employers also would need to train their employees on the codes to be used and ensure that they are coding in and out correctly every time they perform work that does not directly generate tips or are asked by a co-worker for a helping hand. This is completely impractical and unrealistic, particularly when a venue is busy.¹⁴ Quality service requires teamwork, speed, and efficiency, and it is what generates higher tips. A system necessitated by the Proposed Rule would only harm tipped employees by interfering with their ability to provide quality service and actually generate more income.

From a payroll perspective, an employer also would need to engage in a series of computations to: (1) break out the work that supposedly is not part of the tipped occupation, even though it may actually be a well-established duty of that occupation and pay that at full minimum wage; (2) break out the tip supporting work pursuant to the 30-or-more-continuous-minutes requirement and pay that at minimum wage; (3) analyze the percentages of the remaining tip-producing and tip-supporting work performed by the employee under the 80/20 rule; and (4) adjust the rate of pay from the tipped minimum wage to the regular minimum wage and not take a tip credit for more than 20 percent of the workweek if the 20 percent threshold is exceeded. Such a scheme would be unworkable and create tremendous disruptions in workflow as employees would be required to constantly enter their time spent on specific activities into the payroll system. In addition, it would overwhelm employers who do not have the resources to automate this process, and would be an administrative nightmare and huge cost expense for those who program their own payroll systems, those who hire others to program their payroll systems, and those who use third-party providers to customize and/or process their payroll.

¹³ See DOL’s proposed text of 29 CFR §531.56(f)(iii)(A) and (B) at 86 Fed. Reg. at 32846.

¹⁴ See, e.g., *Pellon v. Business Representation International*, 528 F. Supp. 2d 1314 (implementation of the 80/20 rule would require employers to “keep the employee under perpetual surveillance or require them to maintain precise time logs accounting for every minute of their shifts”).

Indeed, the DOL has significantly underestimated that the costs of compliance and the likely outcomes that would result if the Proposed Rule is adopted. Payroll service providers often charge high fees for customizing payroll systems. Shifting everything that conceivably could be considered work that either “directly supports” tip producing work or is not “tip producing” work is not feasible. Employers in service industries already are combatting labor shortages, which means that businesses have extremely limited ability to shift this work to other non-tipped hourly employees. In addition, the labor shortages are requiring employers to offer higher wages to non-tipped employees. This increase in labor costs has contributed to higher prices for consumers.

B. Industries That Employ Tipped Workers Are Struggling to Stay Open.

Many individuals who work in tipped occupations are in the restaurant and hospitality industries. In light of the pandemic-related economic uncertainty and labor shortages these industries are facing, there may not be a worse time for the DOL to issue this Proposed Rule. More than 110,000 eating and drinking establishments in the United States closed for business—temporarily or permanently—in 2020, with nearly 2.5 million jobs erased from pre-pandemic levels. Restaurant and food service industry sales fell by \$240 billion in 2020 from an expected level of \$899 billion.¹⁵ Many people who worked in the industry – both tipped and non-tipped employees – have found other jobs or have left the workforce entirely. After being burdened by shelter-in-place orders, mask mandates, social distancing requirements, and capacity limitations, restaurant owners who are trying to resume operations now are struggling with a labor shortage that is forcing them to close dining rooms, reduce operating hours, and limit menu options.

The pandemic also has resulted in limited supplies of, and increased costs for, food staples. According to the National Restaurant Association, menu prices in May were up more than 4% from a year ago at full-service restaurants and up more than 6% at limited-service restaurants. Rising commodity and other costs are the top external concern among food and beverage industry executives surveyed by tax, audit and advisory firm Mazars USA for its 2021 industry outlook. One-fifth of businesses expected no sales growth at all in 2021.¹⁶

Information compiled by Datassential, which collects and interprets data for food and beverage companies, paints a worrisome picture for restaurants in the existing environment. According to Datassential, more than a third of consumers would opt not to eat out at a restaurant given the current status of inflation and amount of discretionary dollars. Consumers are paying more attention to price when choosing items, even if that means not eating out. Coupled with this hesitancy are consumers’ COVID-19 fears. Additionally, 35% of consumers would “definitely avoid eating out” (an increase of 15% since March 2020) as a result of the new Delta variant.¹⁷

With inflation and cautionary consumer demand, the Proposed Rule would result in further financial hardship for businesses currently utilizing the tip credit. This is because

¹⁵ “NRA’s State of the Restaurant Industry Report Shows Massive Losses” (January 26, 2021), available at, <https://www.producebluebook.com/2021/01/26/nras-state-of-the-restaurant-industry-report-shows-massive-losses/#>

¹⁶ Oler, Samantha. “Rising costs a top concern of food and beverage leaders, survey finds” FOODDIVE. (July 15, 2021), available at, <https://www.fooddive.com/news/rising-costs-a-top-concern-of-food-and-beverage-leaders-survey-finds/603268/>

¹⁷ “COVID-19 Report 55: Here We Go Again?” (July 27, 2021), available at, <https://datassential.com/wp-content/uploads/2021/07/Datassential-Coronavirus55-07-27-21.pdf>

businesses would either: (1) have to navigate the impractical implications of the Proposed Rule by spending time and money to ensure their employees comply, which would undoubtedly prove unworkable in a fast-pace environment dependent on customer satisfaction; or (2) be forced to pay full minimum wage and lose cost-saving advantages inherent of the tip credit utilization. In contrast, the 2020 Tip Final Rule provides a workable, common-sense interpretation of the FLSA tip credit provision that would allow employers in the hospitality industry to focus their time, energy and resources on basic operational functions.

C. Hiring Workers Just to Perform Tip-Supporting Work Is Not Feasible.

If the Proposed Rule is adopted and businesses are required to comply with the “substantial amount of time” requirement as currently written, the labor shortage would make compliance extremely challenging. Restaurants and bars are experiencing significant labor shortages with respect to back of house positions. Employees in these positions already are paid at or above full minimum wage, and employers are offering higher wages to attract more people to these positions just to maintain their current workforce levels. Given the labor shortage, creating new positions solely to perform work that is unrelated to tip-producing work or that directly supports tip-producing work is unfeasible.

V. The Proposed Rule Exceeds DOL’s Authority By Effectively Rewriting Federal Law.

As described above, the federal minimum wage, the base minimum wage for tipped employees, and the tip credit all flow from the statute established by Congress. The current DOL’s animosity toward both the minimum wage and the subminimum wage for tipped employees does not give the DOL the legal authority to make compliance with the tip credit laws so difficult as to write the laws out of existence. The practical challenges, costs, and risks of trying to abide by the Proposed Rule mean employers would be forced to pay full minimum wage instead of attempting to continue to make use of the tip credit.¹⁸ That would have a detrimental effect on whether these businesses can even continue to operate.¹⁹

The administration has the right to advocate for an increase to the minimum wage, and even for the elimination of the statutory tip credit provision as legislative changes. However, the FLSA is a federal statute, and both the minimum wage and the subminimum wage for tipped employees are set by Congress. The DOL cannot substitute its will for that of Congress through regulatory fiat.

Although the current DOL may not agree with the 2020 Tip Final Rule, its opposition toward the use of the tip credit under the guise that the new 2020 Rule needs further study is arbitrary and capricious. By not allowing the 2020 Tip Final Rule to become effective, the DOL

¹⁸ See, e.g., *Pellon*, 528 F. Supp. 2d 1306, 1314 (S.D. Fla. 2007) (requiring employer to scrutinize minute-by-minute activities of tipped employees “would create an exception that would threaten to swallow every rule governing (and allowing) for tip credit for employers.”)

¹⁹ That challenge would be further compounded if the federal minimum wage is significantly increased, as President Biden and Secretary of Labor Walsh both want to more than double the minimum wage to \$15 per hour. And just last month, the DOL issued a Notice of Proposed Rulemaking that would increase the minimum wage for federal contractors to \$15 per hour. See 86 Fed. Reg. 38816 (July 22, 2021).

has eliminated any baseline for comparison between the actual impact of the Final Rule and what the DOL now is proposing.

Additionally, employers who use the tip credit must still comply with FLSA's minimum wage requirements. If employers fail to meet the minimum wage requirements, DOL can investigate and initiate enforcement proceedings, potentially recovering back pay and liquidated damages. If employers are implementing the tip credit improperly, rather than making the credit so hard to administer for all employers, DOL should address this issue through education, compliance assistance, and ultimately, enforcement.

The tip credit has been part of the FLSA since 1966. If Congress wanted to eliminate the tip credit from Section 3(m), it certainly has had ample opportunity to do so. DOL has no authority to usurp Congress' role by using the federal rulemaking apparatus to render the tip credit unusable and subject the service industry to such challenging impracticalities so as to effectively abolish the tip credit.

VI. If Finalized, The Proposed Rule Would Have a Negative Economic Impact on Tipped Employees.

By making it challenging for employers to use the tip credit, the Proposed Rule would likely have a negative economic impact on tipped workers. As noted above, on average, tip-eligible employees make significantly more money per hour than the proposed minimum wage of \$15 and many good-paying hourly jobs. Experience demonstrates that many tipped workers prefer a job in which they can earn extra income through gratuities rather than being paid the minimum wage. When Maine eliminated the tip credit at the state level, effective January 1, 2017, tipped employees revolted and mustered widespread bipartisan support to get it restored.²⁰ Tipped employees also fended off a push to eliminate the tip credit in Washington, D.C.²¹ Tipped employees consider the current system utilizing the tip credit to be a profitable, flexible earning system, and research shows that 97% of tipped employees prefer it over non-tipping alternatives.²²

Under the Proposed Rule, many employers currently utilizing the tip credit may choose to pay the full minimum wage because of the excessive costs and risks associated with compliance and defending against allegations of non-compliance. As a result, tipped employees may ultimately end up making less money than they do currently.

Eschewing the tip credit in favor of paying employees the minimum wage may also result in less take home pay for those employees who participate in workplace tip pools. When employers utilize a tip credit, non-tipped, back of house employees are prohibited from participating in this tip pool. As of April 30, 2021, DOL regulations now permit tip sharing with

²⁰Hoey, Dennis. "Maine group starts petition to exempt tipped workers from new minimum wage rule." PORTLAND PRESS HERALD. (November 30, 2016), available at, <https://www.pressherald.com/2016/11/23/maine-group-starts-petition-drive-to-exempt-tipped-workers-from-new-minimum-wage-rule/>

²¹Romeo, Peter. "D.C. Lawmakers Vote to Save Tip Credit." (October 3, 2018), available at, <https://www.restaurantbusinessonline.com/workforce/dc-lawmakers-vote-save-tip-credit>

²²Paxton, Rebeka. "The Case for the Tip Credit: From Workers, Employers, and Research." EMPLOYMENT POLICIES INSTITUTE. (February 2021), available at, https://epionline.org/app/uploads/2021/02/210204_EPI_PolicyMemo_TheCaseForTheTipCreditFinal_.pdf

back of house employees if no tip credit is taken. In turn, if the Department adopts the Proposed Rule as currently written, businesses may stop utilizing the tip credit and tipped employees may now be required to share their tips with more employees since the pool can lawfully include back of house employees. This means tipped employees who currently earn \$25 or more per hour may earn far less.

Moreover, if the Proposed Rule is adopted, employers who are forced to start paying full minimum wage instead of the tip credit wage would look for ways to mitigate the financial impact of this change. According to surveys by Datassential, operators are already considering automation processes such as robots or self-ordering due to the continued labor shortages and economic impacts of COVID-19.²³ When government regulations create added costs, as the Proposed Rule surely would, automation as an alternative becomes more appealing to employers. Ultimately, this would mean that the Proposed Rule would not only hurt tipped employees' income, but also potentially reduce their job opportunities.

VII. The Proposed Rule Would Create Even Greater Conflicts With State Laws.

The FLSA allows states to implement their own sets of requirements, e.g., many states have a minimum wage that is higher than the federal minimum wage. Similarly various states have their own tip credit laws.²⁴ Some states allow a tip credit under their wage-hour laws, and others do not. The amount of the base minimum wage, tip credit, and standard minimum wage may differ at the state level. If a state law is more restrictive or goes beyond the FLSA, then compliance with the state law normally would result in FLSA compliance. Conversely, if the FLSA is more restrictive, then compliance with the FLSA normally would result in state law compliance. The potential addition of the 30-continuous-minute rule would create a new restriction not normally found at the state level, thus creating even greater tension and confusion between federal and state laws. This added complexity would create additional compliance costs that would ultimately harm employees, employers, and customers.

VIII. The Proposed Rule Would Lead to Increased Litigation.

The Proposed Rule places employers in the unenviable position of either: (1) no longer making use of the tip credit; (2) prohibiting their tip-credit employees performing anything other than work that directly produces tips; or (3) creating and maintaining extensive recordkeeping systems to document their compliance with both the 30-continuous-minute-rule and the 80/20 rule in the event of a DOL audit and/or to defend themselves against litigation by an aggressive plaintiffs' bar. Wage-hour litigation already can be extremely expensive for employers, and it creates leverage for plaintiffs' lawyers even when lawsuits lack any merit. This is particularly true when the analysis would require an extensive review of the minutia of scheduling,

²³ COVID-19 Report 54: Turning the Corner." (June 8, 2021), available at, <https://datassential.com/wp-content/uploads/2021/06/Datassential-Coronavirus54-06-08-21.pdf>

²⁴ According to current DOL data, 10 states/territories require employers to pay the full state minimum wage before tips, and 30 states/territories require employers to pay tipped employees a higher minimum cash wage than that required under the FLSA. See <https://www.dol.gov/agencies/whd/state/minimum-wage/tipped>.

timekeeping and payroll records, and the work that actually was performed under each payroll code.²⁵

IX. Recommendations Going Forward if the DOL Is Going to Consider Issuing a New Rule

As has been discussed above, the Chamber believes the DOL should implement the 2020 Tip Final Rule. If the DOL decides not to do so, the Chamber recommends the following:

- Refrain from issuing a Final Rule until the pandemic has passed and the hospitality and restaurant industries have recovered or become more stable.
- Provide a six-month to twelve-month window between the publication date and the effective date of any Final Rule to provide employers and employees time to consider their options. In addition, make the effective date the first day of a new calendar year (i.e., on January 1), to synchronize with the date when most adjustments to state tip credit and minimum wage levels become effective.
- Eliminate the Proposed Rule's requirement that any tip-supporting work performed for 30 or more continuous minutes be paid at the full minimum wage. That requirement creates too many conflicts and inconsistencies with state laws that allow for a tip credit. The requirement also is in conflict with the statutory language of the FLSA. Tip-supporting work is tip-supporting work, regardless of how long it occurs, and constitutes a legitimate aspect of a tipped occupation. For the same reasons the 80/20 rule should be eliminated.
- If a distinction is going to be made between tipped work and tip supporting work, then the definitions of both should be broadened and made more clear. In addition, if a limit is going to be placed on the amount of tip-supporting work that can be performed in a workweek, then a significantly higher percentage of tip-supporting work should be treated as time spent in a tipped occupation. This would create greater predictability, reduce the likelihood of frivolous litigation, and streamline litigation costs by avoiding arguments over the specifics of tasks that were performed during extremely small amounts of time.
- Allow employers and employees to make use of O*NET as a resource for determining whether work performed by an employee is part of a tipped occupation.

X. Conclusion

At a time when the hospitality and restaurant industries continue to struggle with the aftermath of pandemic-related economic challenges, the costs and uncertainty associated with the Proposed Rule would represent yet another roadblock to economic recovery. The Proposed Rule improperly eviscerates the FLSA tip credit as prescribed by Congress, would increase

²⁵ While some may question whether a "reasonableness" standard would create greater predictability, a reasonableness standard at least allows for a less microscopic analysis of records.

compliance costs for employers by making the tip credit nearly impossible to administer, and could potentially result in less take home pay for employees in tipped occupations. For the foregoing reasons, the Chamber encourages the DOL to withdraw the Proposed Rule and allow the 2020 Tip Final Rule to go into effect.

Respectfully submitted,

A handwritten signature in blue ink that reads "Alice Goodman". The signature is fluid and cursive.

Vice President, Workplace Policy
Employment Policy Division
U.S. Chamber of Commerce

Outside Counsel

Steven Pockrass

Victoria L. Vishi

James Plunkett

Ogletree, Deakins, Nash, Smoak & Stewart, P.C.